Filed 5/9/16 Flannery v. Murray CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| PATRICK FLANNERY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ANDREA MURRAY et al.,<br><br>Defendants and Respondents. | B266651<br><br>(Los Angeles County<br>Super. Ct. No. SC123759) |

APPEAL from an order of the Superior Court of the County of Los Angeles, Gerald Rosenberg, Judge. Affirmed.

Daneshrad Law Firm, and Joseph Daneshrad, for Plaintiff and Appellant.

Law Offices of Ma. Rita S. Vesagas, and Ma. Rita S. Vesegas, for Defendants and Respondents.

Plaintiff and appellant Patrick Flannery appeals from the trial court's order granting an anti-SLAPP[1] motion (Code Civ. Proc. § 425.16)[2] made by defendants and respondents Andrea Murray, Philip Kaufler and Cary Goldstein. Plaintiff contends the trial court erred in granting the motion because the sole cause of action had at least minimal merit. We affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

In October 2009, plaintiff and Murray filed an action against Southern California Gas Company (SCGC), Los Angeles Superior Court (LASC) Case No. PC046735 (Sesnon Fire Action), which was later consolidated under *In re Sesnon Fire Cases*, LASC Case No. BC442504. The Sesnon Fire Action concerned fire damage to a ranch property and a horse boarding business. Kaufler and Goldstein were attorneys but they did not represent plaintiff or Murray in that action. Murray was represented by at least two different attorneys at separate times, including Scott Tepper from October 2009 through about September 2010. Plaintiff was represented by Tepper from October 2009 through June 2012, and thereafter by Joseph Daneshrad—Tepper's brother-in-law and plaintiff's appellate counsel here.

After the Sesnon Fire Action was commenced, Murray filed a lawsuit against plaintiff, LASC Case No. BC438538, for breach of contract and fraud concerning the ownership of a ranch property and the horse boarding business on that property (Murray Action). Murray was represented by Kaufler and Goldstein in that action. Around June 2012, Tepper filed a notice of lien in the Sesnon Fire Action based on his prior representation of plaintiff and Murray in that case.

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[1] "SLAPP is an acronym for strategic lawsuit against public participation. [Citation.]" (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 957, fn. 3.)

[2] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

In February 2013, the trial court in the Sesnon Fire Action held a hearing at which it memorialized the terms of a confidential settlement that plaintiff and Murray reached with SCGC after two days of a mandatory settlement conference. Pursuant to the settlement agreement, it was agreed: SCGC was to pay specified sums; plaintiff and Murray provided SCGC and agents, etc., with a general release of all claims arising out of or in connection with the facts of that case; each "party" would bear their own costs and attorney fees in that litigation; plaintiff and Murray agreed to dismiss their lawsuit against SCGC; and the parties agreed the terms of the settlement agreement were confidential. The agreement further provided SCGC's payments would be made in specified sums to plaintiff, Murray, and Goldstein to fully discharge a notice of lien he had filed in that case.

The following exchange occurred at the hearing:

"[] Kaufler: Your Honor, there is one exception I would like to state. We plan on going to court in the pending civil matter between [plaintiff] and Murray [i.e., the Murray Action] and advising the court of this settlement because we intend to seek an injunction—restraining order—

"The Court: Then you seek to do it under seal. Okay. Because the terms of this settlement are confidential. So you will need to . . . do that under seal. That is between you and the other court. But this . . . settlement is confidential."

In February 2013, Tepper sent an e-mail to plaintiff, Murray, and SCGC, and their respective counsel, stating he had been advised of the settlement in the Sesnon Fire Action and demanded SCGC set aside one-third of any settlement payments for Tepper. Also, following the confidential settlement in the Sesnon Fire Action, judgment was entered in favor of Murray and against plaintiff in the Murray Action.

On February 28, 2013,[3] Murray, through Kaufler and Goldstein, filed in the Murray Action an ex parte application made pursuant to California Rules of Court, rule

[3] The filed-stamped copy of the Ex Parte Application to Seal indicates that it was filed on February 28, 2012, with a hearing date of exactly one year later—February 28,

2.551 (Ex Parte Application to Seal) for an order to file under seal an ex parte application for preliminary injunction and/or restraining order. The Ex Parte Application to Seal sought to seal the ex parte application for preliminary injunction and/or restraining order (Ex Parte Application for Injunction/TRO) and "[a]ll papers and records related to this motion." On the day the Ex Parte Application to Seal was filed, the trial court issued a minute order granting it, and the Ex Parte Application for Injunction/TRO was filed under seal.

The sealed Ex Parte Application for Injunction/TRO sought to prohibit plaintiff from negotiating any settlement proceeds obtained by SCGC in the Sesnon Fire Action, and to place those funds into a trust account or to interplead them with the court. [4] Murray, through Kaufler and Goldstein, submitted a "Proposed Order" in connection with the Ex Parte Application for Injunction/TRO. There is no indication in the record whether defendants filed the proposed order under seal (with the Ex Parte Application for Injunction/TRO or otherwise), filed it unsealed, or lodged it with the trial court.

Also on February 28, 2013, the trial court in the Murray Action interlineated, executed, and filed the unsealed proposed order submitted by defendants (Injunction/TRO Order). The Injunction/TRO Order provided plaintiff was prohibited from negotiating the settlement proceeds obtained in the Sesnon Fire Action (in a specified amount), and he was to deposit the settlement proceeds (in a specified amount) in trust.[5] The Injunction/TRO Order scheduled a hearing on Murray's request for a permanent injunction for April 10, 2013. On March 8, 2013, attorney Tepper purchased a copy of the Injunction/TRO Order.

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2013. Plaintiff states, and defendants do not disagree, that the ex parte application was filed on February 28, 2013, not February 28, 2012.

[4] The Ex Parte Application for Injunction/TRO is not in the record.

[5] It is undisputed that the order (and its "proposed" version) referenced confidential terms of the settlement agreement.

On March 13, 2013, SCGC's counsel sent an e-mail to Tepper and plaintiff's counsel, providing three choices for distribution of the settlement funds including, inter alia, interpleading the funds with the court. Tepper responded by providing SCGC with a copy of the Injunction/TRO Order, and because several claims were being made to the settlement funds, Tepper stated he believed SCGC's "only choice" was to interplead those funds with the trial court. SCGC's counsel replied, stating he was unaware of the Injunction/TRO Order, agreed with Tepper's assessment, and advised SCGC would be interpleading the funds. The following day, SCGC's counsel sent an e-mail to plaintiff's counsel stating, "I am concerned that I had to learn about the [the Injunction/TRO Order] from [] Tepper, since that order effectively requires that [SCGC] interplead the funds in dispute."

On March 15, 2013, SCGC filed a complaint in interpleader against plaintiff, the Daneshrad's law offices, and Tepper and his law firm—LASC Case No. BC503027 (Interpleader Action). SCGC alleged Tepper, plaintiff, Daneshrad, and "others," claimed "an interest to all or some of any settlement proceeds payable to [plaintiff] under" the confidential settlement agreement. SCGC interpled with the court the disputed settlement proceeds. On April 10, 2013, the trial court in the Murray Action denied Murray's request for a preliminary injunction, finding the Ex Parte Application for Injunction/TRO was moot because SCGC's Interpleader Action adequately protected Murray's interest in the settlement proceeds.

On February 11, 2015, based on the disclosure of confidential settlement terms in the Injunction/TRO Order, plaintiff filed the underlying complaint against defendants alleging a single cause of action for breach of contract. Plaintiff alleged in the complaint that all three defendants "entered into" the confidential settlement agreement with plaintiff and SCGC; defendants agreed to keep the terms of the settlement agreement confidential; defendants breached the confidential settlement agreement "by divulging the confidential terms of the settlement to the general public on February 28, 2013 . . ."; and plaintiff suffered damages in excess of $750,000.

On April 17, 2015, the defendants filed their anti-SLAPP motion, arguing the Ex Parte Application for Injunction/TRO made to the trial court was a protected activity. Defendants also argued plaintiff could not demonstrate a likelihood of prevailing on his breach of contract cause of action because: defendants did not breach the confidentiality agreement; Kaufler and Goldstein were not parties to the confidentiality agreement and thus not bound to its terms; plaintiff did not suffer damages; any damages suffered by plaintiff were not caused by defendants; and the litigation privilege barred plaintiff's claim.

Plaintiff opposed the anti-SLAPP motion, arguing, inter alia, defendants' breach of the confidential settlement agreement caused him to suffer damages because he was deprived of immediate use of at least two-thirds of the settlement funds; was deprived of $81,053.44 in settlement funds because the court in the Sesnon Fire Action awarded that amount to SCGC as attorney fees and costs in the Interpleader Action; incurred attorney fees exceeding $350,000 to litigate the Interpleader Action; and took out a $50,000 high interest loan as a lien to cover litigation costs in the Sesnon Fire Action.

The trial court issued a minute order granting defendants' anti-SLAPP motion,[6] stating, "The Breach of Contract claim is based on a court order with confidential information which was not sealed. [¶] Plaintiff fails to show that he will probably prevail on his claim against these defendants. When defendants filed their application for injunctive relief, it was under seal. Therefore, defendants never published the settlement terms. [¶] It is not the Court Order that allegedly caused plaintiff's damages because the interpleader action indicates that it was prompted by former counsel [] Tepper's claims against the settlement funds, not the order granting injunctive relief." The trial court subsequently issued an order granting defendants' anti-SLAPP motion, and dismissing

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[6] The record does not include a reporter's transcript of the hearing. Defendants do not contend that the record is inadequate for that or any other reason, and the parties do not rely on the oral argument before the trial court. For those reasons, and because we review the trial court's decision de novo, the record is adequate for our review. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699; *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 677.)

plaintiff's complaint with prejudice, subject to defendants' motion for attorney fees and costs as the prevailing defendants pursuant to section 425.16, subdivision (c)(l).

## DISCUSSION

### A. Standard of Review

We review de novo the trial court's order denying an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326 (*Flatley*); *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Flatley*, *supra*, 39 Cal.4th at p. 326.)

### B. Applicable Law

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16—known as the anti-SLAPP statute - to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) "The goal [of section 425.16] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806.)

Section 425.16, provides "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff

has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) As we stated in *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, at pages 468 through 469, "In ruling on a special motion to strike under section 425.16, the trial court employs a two-prong analysis. Initially, under the first prong, the trial court determines '"whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity . . . If the court finds such a showing has been made, it then determines [under the second prong] whether the plaintiff has demonstrated a probability of prevailing on the claim." [Citation.]' [Citation.]" """"The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" [Citations.]'" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34-35 (*Rohde*).)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) "Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high . . . . Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

### C. Analysis

Plaintiff concedes the first prong of the anti-SLAPP statute—the cause of action arises from protected speech or petitioning—was satisfied. Plaintiff challenges the second prong; he contends his breach of contract cause of action had at least minimal merit. As noted, plaintiff bears the burden of proving the merits of his action. (*Rohde, supra,* 154 Cal.App.4th at pp. 34-35.)

*1. Kaufler and Goldstein Were Not Parties to the Settlement Agreement*

Plaintiff alleged in his complaint that all three defendants "entered into [the] confidential settlement agreement" with plaintiff and SCGC. However, on appeal, plaintiff does not contend Kaufler and Goldstein were "parties" to the settlement agreement, and has not pointed to any evidence in the record to establish they were parties to the agreement. Plaintiff instead contends they were "privy" to the confidential terms of the confidential settlement agreement.

When the trial court held a hearing in the Sesnon Fire Action to "memorializ[e] the terms of the settlement," it stated the terms that constituted "a binding settlement" and were "confidential." Kaufler and Goldstein appeared at the hearing, not as counsel of record in that proceeding, but as "counsel representing [Murray] in other cases" (including the Murray case).

It is true Kaufler and Goldstein were "privy" to the confidential terms of the settlement agreement in that they were present and were told by the trial court not to disclose "the terms of this settlement" because they were "confidential." But their mere presence did not make Kaufler and Goldstein parties to the confidential settlement agreement. The confidential settlement agreement embodied the terms of a settlement regarding the claims of plaintiff and Murray against SCGC. In response to the trial court's inquiries, plaintiff and Murray stated they heard the terms of the settlement as recited by the trial court, understood those terms, had whatever opportunity they desired to discuss the terms with their respective counsel, and there were no other terms of the settlement. Kaufler and Goldstein engaged in no similar colloquy with the court. They were not parties to the settlement agreement and were not bound by its terms.[7]

[7] Whether Kaufler and Goldstein violated the trial court's order in the Sesnon Fire Action is not at issue in this appeal.

*2. Defendants Did Not Disclose Confidential Terms*

Plaintiff contends the confidential terms of the settlement agreement were disclosed in violation of that agreement by defendants' submission of the proposed order to the trial court in the Murray Action. The record does not support plaintiff's position.

There is nothing in the record indicating the proposed order was unsealed when submitted to the court. In addition, the parties do not dispute defendants filed the Ex Parte Application for Injunction/TRO under seal in the Murray Action. The California Rules of Court provide a request for ex parte relief (here, Murray's request for an injunction and temporary restraining order) "must include" a proposed order. (Cal. Rules of Court, rules 3.1201 and 3.1206.) Thus, it stands to reason that, if defendants complied with the rules of court (and nothing in the record suggests they did not), the application *must* have included the proposed order and was presumably filed under seal with it. Plaintiffs point to nothing in the record to demonstrate such was not the case.

Plaintiff also contends the confidential terms of the settlement agreement were disclosed in violation of the agreement by virtue of the trial court filing the Injunction/TRO Order unsealed. Although it is undisputed that it was the trial court that publicly filed the Injunction/TRO Order, plaintiff faults defendants for the trial court doing so because, under California Rules of Court, rule 2.551, subdivision (e)(2), defendants did not include in the proposed order a statement that the order was to be sealed.

California Rules of Court, rule 2.551, subdivision (e)(2), by its express terms, applies only to the order sealing the record. It provides the order sealing a record "must state whether . . . the order itself . . . [is] to be sealed." (Cal. Rules of Court, rule 2.551, subd. (e)(2).) Despite plaintiff's reliance on the rule, it does not apply to a subsequent order—here, the Ex Parte Application for Injunction/TRO.

In any event, Murray's Ex Parte Application to Seal sought to seal not only the Ex Parte Application for Injunction/TRO, but "[a]ll papers and records relating to this motion.'" Therefore, there was no need for defendants to include a statement in the proposed order that when the trial court executes it, it is to be filed under seal. We see no

reason to fault defendants for the trial court's decision to file the Injunction/TRO Order unsealed.

## DISPOSITION

The order is affirmed. Defendants are awarded their costs on appeal.

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KUMAR, J.*

We concur:

TURNER, P. J.

BAKER, J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.